OAH 4-2200-19898-2

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE POLLUTION CONTROL AGENCY

In the Matter of the
Administrative Penalty Order
Issued to Larry Cozzi

**FINDINGS OF FACT, CONCLUSIONS AND RECOMMENDATION**

The above-entitled matter came on for hearing before Administrative Law Judge Bruce H. Johnson on September 9, 2008, at the Office of Administrative Hearings, 600 North Robert Street, St. Paul., Minnesota 55101. The hearing resumed on September 14, 2009, at the Office of Administrative Hearings, 320 West Second Street, Suite 714, Duluth, Minnesota. The OAH hearing record closed with the receipt of the last posthearing brief filed by the parties on December 24, 2009.

Robert B. Roche, Assistant Attorney General, appeared on behalf of the Minnesota Pollution Control Agency Staff (MPCA). Paul R. Haik, Attorney at Law, appeared on behalf of Larry Cozzi (the Petitioner).

## STATEMENT OF ISSUES

1. Did the Petitioner discharge fill material into a wetland while engaging in construction activity without first obtaining an NPDES/SDS construction storm water permit in violation of Minn. R. 7050.0210, subp. 1?

2. Did the Petitioner violate the provisions of Minn. R. 7090.2010, subp. 3, by failing to implement Best Management Practices to prevent sediment and construction debris from being introduced into wetlands and other waters of the state?

3. Were construction activities conducted on the Petitioner's property a public nuisance in violation of Minn. R. 7050.0210, subp. 2?

4. If the Petitioner did violate one or more of the above rules, were the violations serious, requiring imposition of a non-forgivable penalty, and was the assessed penalty reasonable and appropriate?

The ALJ concludes that the Petitioner violated Minn. R. 7090.2010, subps. 1 and 3, and 7050.0210, subp. 2; that the MPCA properly issued the APO dated February 8, 2008, to him; and the civil penalty of $9,350.00 was reasonable and supported by the record. That APO and civil penalty should therefore be affirmed.

Based upon all of the proceedings herein, the Administrative Law Judge makes the following:

## FINDINGS OF FACT

### Background

1. Since the 1960s, the Respondent has owned property described as Lots 516, 526, and 527 of the Homecroft Park Subdivision of the Town of Rice Lake (the Town) near Duluth, Minnesota. The property is also known as 4742 5th Avenue South, Duluth, Minnesota 55803.[1]

2. 4th and 5th Avenues South run in a north-south direction in the Homecroft Park Subdivision and terminate at their northern ends at Calvary Road. The three lots at issue lie between 4th and 5th Avenues South, with the eastern property line of Lot 516 abutting 4th Avenue South (the 4th Avenue Property) and the western property lines of Lots 526, 527, and 528 abutting 5th Avenue South (the 5th Avenue Property). (The 4th Avenue and 5th Avenue Properties are collectively referred to as "the Properties.") The east property line of Lot 526 abuts the west property line of Lot 516.[2] The size of the lots is 200 feet along the adjacent avenues by 306.5 feet deep.[3]

3. Minnesota's Wetland Conservation Act, Minn. Stat. ch. 103G, requires the Commissioner of the Department of Natural Resources (DNR) to issue permits for the use and appropriation of wetlands.[4] It also requires state and local officials to cooperate with the DNR to the extent "necessary or proper for the enforcement of the provisions, rules, standards, orders, or permits specified in [the Act]."[5] In 2003, the South Saint Louis Soil and Water Conservation District (SSSWCD) entered into a partnership with the DNR to assist that department in the enforcement of the Wetland Conservation Act rules, standards, orders and permits.[6]

4. Under federal and Minnesota law,[7] a National Pollutant Discharge Elimination System/State Disposal System (NPDES/SDS) storm water construction permit is required for construction activities that result in land disturbance of equal to or greater than one acre or less than one acre of total land area that is part of a larger common plan of development or sale if the larger common plan will ultimately disturb equal to or greater than one acre.[8] The MPCA is the responsible authority for issuing and enforcing those permit requirements in Minnesota.[9] Minn. Stat. § 115.06, subd. 3, requires the state's political subdivisions to cooperate with the MPCA "in obtaining

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[1] Transcript (Tr.), pp.303-304; Exhibit (Ex.) 3. The evidence in the record did not definitively establish the ownership of other adjacent lots, but the ownership of those other lots is not material to this proceeding.
[2] Ex. 3.
[3] Ex. 4.
[4] Minn. Stat. § 103G.101, subd. 2.
[5] Minn. Stat. § 103G.105.
[6] Tr. p. 57.
[7] 40 C.F.R. §122.26(a)(1) and (9)(i)(B); Minn. Stat. § 115.07; Minn. R. 7090.0010 *et seq*.
[8] Minn. R. 7090.2010, subp. 1(A); Minn. R. 7090.0080, subp. 4 (2007).
[9] Minn. R. 7090.0020.

compliance with the provisions of [Chapter 115]." In approximately 2004, the SSSWCD also entered into a partnership with the MPCA to assist that agency in the administration and enforcement of the State Water Pollution Control Act, Minn. Stat. §§ 115.01 through 115.09.

**Early Permitted Activities and Construction Work**

5. From the 1960s through the 1990s, the Petitioner periodically performed varying amounts of construction work on both the 4th and 5th Avenue Properties. That construction work occasionally involved placing fill material on portions of both those properties.[10] Fill material placed on the 5th Avenue Property was located on a driveway leading onto that property from 5th Avenue and near a garage that is no longer present on that property.[11]

6. In August 1970 the Respondent received a building permit from the Town to build a residence on the 5th Avenue Property, specifically on Lots 527 and 528.[12] On or about October 4, 1978, the Respondent obtained a permit to locate a 14-foot by 70-foot mobile home as an addition to the residence on the 5th Avenue Property, specifically on Lots 526 and 527.[13]

7. The residence on the 5th Avenue property was destroyed by fire in 1994.[14]

8. In 2005, the 4th and 5th Avenue Properties both contained some upland areas and some wetlands.[15]

9. In the summer of 2005, Lot 516 contained primarily upland terrain on which the Petitioner had built a home and maintained parking areas for vehicles used in his business. However, there was a large area of wetlands that extended from north to south along the western boundary of lot 516 of the 4th Avenue Property.[16] Those wetlands extended across the western boundary of Lot 516 into the eastern portion of adjacent Lots 526 and 527 of the 5th Avenue Property.[17] At that time, although the western portions of Lots 525 and 527 contained upland area, there were no structures on the 5th Avenue Property.[18]

10. Sometime in the summer of 2005, the Petitioner applied for a permit from the U. S. Army Corps of Engineers (the Corps of Engineers) to place approximately 400 cubic yards of fill material on approximately 10,000 square feet of the wetland areas of Lot 516 of the 4th Avenue Property. The reason for the request was that the Petitioner

[10] Tr. pp. 288-291, 293-294, 378.
[11] Tr. pp. 288-291.
[12] Ex. 5.
[13] Ex. 5.
[14] Tr., pp. 303-304.
[15] Tr. pp. 61-62; Ex. 12.
[16] Ex. 12; Tr. pp. 61-62, 300-304.
[17] Ex. 4; Tr. pp. 61-62, 300-304.
[18] Ex. 4.

was proposing to construct a new residence and a large garage on the 4th Avenue Property that would partially extend into the wetland areas on Lot 516.[19]

11. R. C. Boheim is the District Manager of the SSSWCD and has served in that capacity since 2005. Mr. Boheim has a Bachelor of Science degree in biology from the University of Wisconsin-Oshkosh. In 1999, he attended a wetland delineation course sponsored by the Minnesota Board of Water and Soil Resource, which involved instruction on identifying wetland plants, wetland soils, and wetland hydrology. Moreover, the University of Minnesota's Erosion Center has certified Mr. Boheim as an installer and inspector, and he currently continues to maintain that certification.[20] Finally, he has been attending frequent refresher courses and training sessions on identifying wetlands and on erosion control. Since 2003, he has conducted or participated in hundreds of field inspections of wetland areas in connection with his duties.[21]

12. In connection with that permit request to the Corps of Engineers and the DNR, Mr. Boheim, acting under SSSWCD's cooperation agreement with the DNR, a representative of the Corps of Engineers, and the Petitioner's brother, Steve Cozzi, met on the Petitioner's property sometime in early September 2005.[22] At that time, Mr. Boheim and the Corps of Engineers' representative marked the boundaries of areas on the Properties that they determined were wetland areas by placing stakes with pink flags around those areas.[23] In addition to marking the portions of Lot 516 of the 4th Avenue Property that would be affected by fill in the Petitioner's Corps of Engineers and DNR permit applications, Mr. Boheim also marked the boundaries of the wetland areas of Lots 526 and 527 that were not then the subject of a pending permit.[24] Mr. Boheim did not identify wetlands on the 5th Avenue Property in strict conformity with Corps of Engineer Technical Standards or Inspection Methods.[25] Rather, he identified wetlands on the Properties based on his education and training as a biologist, his experience in making hundreds of field inspections, and his visual observations of wetland vegetation and wetland hydrology, and wetland soils.[26]

13. On September 28, 2005, the Corps of Engineers issued a permit to the Petitioner authorizing him to place approximately 400 cubic yards of fill material on approximately 10,000 square feet of the upland areas of Lot 516 of the 4th Avenue Property.[27]

14. Also on September 28, 2005, Martin Paavola, the Town's building inspector, saw an excavating contractor hauling fill material and placing it on Lot 527.

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[19] Tr. pp. 341-342; Ex. 4.
[20] Tr. p. 67-68.
[21] Tr. pp. 63-65.
[22] Tr. p.61.
[23] *See* further discussion in Part III-C of the Memorandum that follows.
[24] Tr. p. 62.
[25] Exs. 18, 19, and 20.
[26] Tr. pp. 62-68.
[27] Ex. 12.

Mr. Paavola instructed the contractor to stop placing fill on the property until the Corps of Engineers could be contacted to determine the extent to which fill material would be permitted on the property. Believing that the Corps of Engineers had, in fact, approved the fill site, Mr. Paavola allowed the contractor to continue placing fill on that site.[28] While on the property, Mr. Paavola saw the stakes the Corps of Engineers had placed on the site to delineate the boundary between upland areas that could be filled from wetland areas that could not be filled.[29]

15. On September 30, 2005, based on Mr. Paavola's inspection of Lot 527, the Petitioner applied for and received a permit from the Town allowing him to place fill on upland portions of Lot 527. The Plot Plan accompanying that permit depicts the approximate boundaries between upland areas that could be filled from wetland areas that could not be filled.[30] In that application, the Petitioner represented that fill would only be placed on the upland areas of the lot and not in any of the adjacent wetlands.[31]

**August 2006 Construction Activities and Site Inspection**

16. On August 16, 2006, Mr. Boheim and representatives of the Corps of Engineers conducted a site inspection of both the Properties. Mr. Boheim's inspection of the Properties had the dual purpose of assisting the DNR and BWSR in the enforcement of the Wetland Conservation Act and assisting the MPCA in the enforcement of the State Water Pollution Control Act.

17. Mr. Boheim made a visual comparison of the terrain on the Properties with the nature of the terrain that he had observed when marking the boundaries of wetlands on the Properties in September 2005. When it appeared to him that what had been wetlands in September 2005 had recently been disturbed by construction and fill activities, he and the Corps of Engineers representative conducted a soil check in the area that appeared to have been recently filled which established that fill had been placed on hydric soil that is characteristic of a wetland. The specific results that the soil check documented were: "0 – 6" – Fill, 6 – 18" 10yr 2/1 organic." Mr. Boheim also observed the presence of hydric vegetation adjacent to recently filled—specifically, "red osier, dogwood, Canada blue joint grass, and speckled alder."[32] Finally, Mr. Boheim observed wetland hydrology in and around the fill areas. Based on these and other observations made on the site, Mr. Boheim found that recent construction activity had disturbed significant areas of what had been Type 6/7 wetlands in September 2005.[33]

18. Thereafter, Mr. Boheim and the Corps of Engineers representative marked areas of the Properties, which had been marked as wetlands in September 2005 and

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[28] Tr. pp. 341-342; Ex. 7.
[29] *Id*.
[30] Ex. 4. The attached Plot Plan does not indicate the exact length and width of the fill area.
[31] Tr. pp. 341-342; Ex. 4.
[32] Ex. 13; Tr. p. 93.
[33] *Id*.; Exs. A through D; Tr. pp. 69-84. *See* Minn. R. 8420.0111, subp. 79, in which the Board of Soil and Water Resources characterizes wetlands by type; *see also* discussion in Part IV-A of the Memorandum, which addresses the relevance of wetland types to the material issues in this proceeding.

which had been recently filled, using a global positioning system receiver (GPS), with the following results: "East Area[34]: 17,800 Sq. Ft. of impact to a Type 6/7 wetland. West Area[35]: 42,600 Sq. Ft. of impact to a Type 6/7 wetland. Total Impact: 60,400 square feet.[36]" Based on those measurements and aerial photographs,[37] Mr. Boheim found that construction activities had been conducted that had disturbed 2.5 acres of the Properties. Of those 2.5 acres of disturbance, 1.39 acres of wetlands had been disturbed by placing fill on them, and 1.11 acres of upland had been disturbed by removing the vegetation.[38]

19. The wetlands on the Properties that were disturbed by the placement of fill material are located approximately 500 feet from Tischer Creek, which is a designated trout stream[39] and "special water" within the meaning of Minn. R. 6264.0050, subp. 4. Storm water on those wetlands flows into Tischer Creek through a drainage ditch on the Properties.[40] Construction activities conducted within 2,000 feet of a special water are required to incorporate additional types of Best Management Practices (BMPs).[41]

20. While on the Properties on August 16, 2006, Mr. Boheim also observed only one BMP with potential to prevent erosion, keep soil on the site, and prevent dislodged soil from being deposited in waters of the state through sedimentation.[42] That exception was a single length of black silt fence in a grassy area of the Properties.[43] As a result of the absence of other BMPs required by rule, Mr. Boheim observed that soil and construction debris had been introduced into a drainage ditch connecting wetlands on the Properties with Tischer Creek.[44]

21. After completing his site visit, Mr. Boheim prepared a Wetland Conservation Restoration Order (Restoration Order) to the Petitioner that documented his observations and findings for use by DNR in discharging that department's responsibilities under the Wetland Conservation Act.[45] The Restoration Order was issued on December 8, 2006, and was served on the Petitioner by certified mail on December 12, 2006.[46] The Restoration Order contained the following provision:

> 6) This project has disturbed greater than one acre of land and therefore you need to obtain a general storm water permit for construction activity

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[34] *I.e.*, the 4th Street Property.
[35] *I.e.*, the 5h Street Property.
[36] Ex. 13.
[37] Exs. O and P.
[38] Ex. B; Tr. pp. 84-86.
[39] *See* Minn. R. 6264.0050, subp. 4(PP)(79).
[40] Ex. L; Tr. pp. 108-112.
[41] Appendix A to the Minnesota Pollution Control Agency document General Permit Authorization to Discharge Storm Water Associated With Construction Activity Under the National Pollutant Discharge Elimination System/State Disposal System Permit (NPDES/SDS) Program. (Hereafter Appendix A)
[42] Tr. pp. 70, 79-83.
[43] Tr. pp. 82-83; Ex. D.
[44] Tr. pp. 108-109.
[45] Tr. pp. 93-99; Ex. F.
[46] Ex. F.

from the Minnesota Pollution Control Agency. * * * This permit shall be applied for prior [to] December 15, 2006.[47]

22. On January 23, 2007, the Petitioner appealed the Restoration Order to the Minnesota Board of Water and Soil Resources (the BWSR) pursuant to Minn. R. 8420.0290. On February 7, 2007, BSWR issued an Order denying the Petitioner's appeal as untimely and affirming the Restoration Order.[48]

**The August 7, 2007, Site Inspection**

23. On August 7, 2007, Mr. Boheim conducted another site inspection of the Properties. The purpose of that site visit was, in part, to provide SSSWCD assistance to both the DNR and MPCA in the enforcement of the Wetland Conservation Act and the State Pollution Control Act, respectively. At that time, Mr. Boheim found the terrain on the Properties essentially unchanged from the time of his August 16, 2006, site inspection, the only difference being that some vegetation and weeds had begun to grow in the wetland areas that had been filled in 2006.[49] On August 7, 2007, Mr. Boheim found no evidence that any BMPs had been implemented between August 2006 and August 2007.

24. More specifically, during Mr. Boheim's August 7, 2007, inspection, he observed that no slope stabilization had been performed on portions of the Properties that had been graded and filled in August 2006, nor had temporary or permanent ground cover been placed on erodible soils. He also observed that there were no perimeter controls present to prevent sediment from erodible fill materials from being discharged into adjacent wetlands. As a result, Mr. Boheim observed that sediment from erodible soils on the Properties had been discharged into adjacent wetlands, and that no efforts had been made to remove sediment from those wetlands.[50]

25. What Mr. Boheim observed on the Properties on August 7, 2007, was the continued presence of solid material, dirt, and construction debris in Type 6/7 wetlands and in an adjacent drainage ditch, water from which flows into Tischer Creek.[51]

26. After completing his inspection of the Properties on August 7, 2007, Mr. Boheim prepared a written inspection report containing his findings and conclusions about apparent violations of MPCA rules. He then forwarded his report to the MPCA with a copy to the Petitioner.[52]

[47] Ex. F, p. 2 of 3.
[48] Ex. Q.
[49] Tr. pp. 99-100; Exs. G, H, and I.
[50] Tr. pp. 103-104; Ex. J.
[51] Tr. pp. 108-112.
[52] *Id*.

27. Neither the Petitioner nor any other person has ever applied to the MPCA for an NPDES Permit for the construction activities on the Properties that occurred on or about August 16, 2006.[53]

**Subsequent Enforcement Actions**

28. On August 8, 2007, the MCPA received a copy of Mr. Boheim's inspection report of August 7, 2007, and the agency thereafter began preparing a case development form to determine whether or not enforcement actions against the Petitioner under the SWPDA were warranted.[54]

29. As part of the case development process, the MPCA convened an enforcement forum that met on August 22, 2007, to determine whether the MPCA should proceed with an enforcement action and the type of any enforcement action. After considering the evidence of potential violations by the Petitioner of the State Water Pollution Control Act (SWPCA) and applicable MPCA rules and the similarity of those potential violations to other enforcement cases, the enforcement forum recommended that the MPCA issue an Alleged Violation Letter (AVL) to the Petitioner. Thereafter, after considering the Petitioner's response to the AVL, the enforcement forum recommended that the MPCA issue an Administrative Penalty Order (APO), if appropriate.[55]

30. On August 27, 2007, the MPCA sent an Alleged Violation Letter (AVL) to the Petitioner.[56] The AVL provided the Petitioner with notice of the following violations of applicable rules:

a. Beginning construction activities that disturbed more than one acre of land without first obtaining an NPDES/SDS Construction Stormwater Permit in violation of Minn. R. 7090.2010.

b. Violating the provisions of Minn. R. 7090.2010, subp. 3 by failing to comply with the storm water discharge design requirements, construction activity requirements, and the requirements set forth in Appendix A to the MPCA's General Permit under the federal NPDES/SDS Program.[57]

c. Creating nuisance conditions in violation of Minn. R. 7050.0210.

In addition to those notices, the AVL directed the Petitioner to obtain NPDES/SDS permit coverage for the construction activity that had occurred on the Properties and thereafter to bring the Properties into compliance with all terms and conditions of that permit. The AVL also directed the Petitioner to submit a Stormwater Pollution

[53] Tr. pp. 108, 201-203.
[54] Tr. pp. 202-204; Ex. L.
[55] Ex. L, ¶ 15
[56] Ex. M.
[57] Minn. R. 7090.0060 incorporates those documents by reference into Minn. R., Chapter 7090.

Prevention Plan to the MPCA and to provide the agency with photographic evidence of compliance with that permit.[58]

31. The Petitioner failed to respond to the AVL that the MPCA sent to him.[59]

32. Thereafter, the MPCA prepared an Administrative Penalty Order (APO) Penalty Calculation Worksheet to be used in determining the appropriate penalty amount. The Penalty Calculation Worksheet incorporates the factors to be considered under Minn. Stat. § 116.072 and provides guidance for determining the appropriate penalty amount.[60] In calculating the base penalty, the Worksheet uses a matrix to determine whether the potential for harm to humans, animals, air, water, land, or other natural resources was minor, moderate or severe (set out on the vertical axis of the matrix, labeled "Potential for Harm"), and whether the deviation from compliance was minor, moderate, or severe (on the horizontal axis of the matrix, labeled "Deviation from Compliance"):

| | | **Deviation from Compliance** | | |
|---|---|---|---|---|
| | | Minor | Moderate | Major |
| **Potential** | Major | $5,000 to $2,000 | $8,000 to $3,500 | $10,000 to $5,000 |
| **For** | Moderate | $2,000 to $500 | $3,500 to $1,000 | $5,000 to $2,000 |
| **Harm** | Minor | $500 to $0 | $1,000 to $200 | $2,000 to $500 |
| | | Base Penalty Range | | |

33. The worksheet permits the base penalty to be adjusted (enhanced or mitigated) for willfulness or culpability, history of past violations, economic benefit gained from the violation, and other factors as justice may require. [61]

34. The enforcement forum, which the MPCA convened for the Petitioner's case, considered the information presented in the Case Development Form and the APO worksheet determined that the Petitioner's violations of applicable rule were serious, stating:

> The failure to apply for and receive a general NPDES/SDS storm water permit for construction activity is considered a serious violation, as the

[58] Tr. p. 209; Ex. M.
[59] Tr. p. 209.
[60] Tr. pp. 210-214; Ex. N.
[61] Ex. N.

permit is the primary compliance tool of the Storm Water Project. The NPDES/SDS construction storm water permit ensures that permittees are implementing the appropriate BMPs to prevent and minimize detrimental impacts to waters of the state. The failure to install appropriate sediment and erosion control BMPs to protect adjacent surface water which include[s] a designated trout stream, are also considered serious violations. Additionally, impacts to waters of the state in the form [of] sediment are considered serious violations. Sediment clouds the water making it difficult for fish to feed properly. Turbid water is abrasive to fish gills and disrupts their breathing processes. Deposited sediment on a stream bottom eliminates suitable spawning habitat for many organisms.[62]

35. The forum also found that the Potential for Harm factor for Violation Group #1 should be rated as Moderate because:

> The NPDES/SDS construction stormwater Permit is intended to prevent harm to water resources from construction activities. To obtain the Permit, site operators must certify that they understand and accept the conditions of the Permit. The Permit also requires site operators to develop a Stormwater Pollution Prevention Plan (SWPPP) for the project prior to commencing land disturbing activities. Preparation of the SWPPP requires familiarity with the site and with risks posed by stormwater runoff, and particular to the development of the site. The SWPPP addresses site-specific details essential to protecting water resources from the effects of erosion and sedimentation from construction activities. Failure to obtain the Permit reduces the likelihood that site operators will anticipate and avoid harm to water resources from construction activities because of site characteristics. This increases the potential that harm will occur. Though failure to obtain the Permit and prepare the SWPPP increases the potential for harm to water resources, the failures themselves do not result in actual environmental harm. Therefore, the potential for harm from failing to obtain the Permit is considered moderate.[63]

36. The forum found that the Deviation from Compliance for Violation Group #1 was Major because:

> State rule requires that the NPDES/SDS construction stormwater Permit be obtained for any activities disturbing land equal to or greater than one acre in area. A pre-condition for obtaining permit coverage is the preparation of the SWPPP, a key Permit provision that ensures site-specific details related to erosion control have been evaluated and addressed. The failure to prepare a SWPPP indicates minimal, if any, consideration of Permit requirements and planning for site-specific BMPs. The Permit application is the only notice that the MPCA receives regarding

[62] *Id*.
[63] Ex. N.

> the proposed project; without that application and notice of the project, the MPCA is unable to conduct its regulatory oversight functions (e.g. onsite inspections, SWPPP review, etc.). The Permit also contains self-implementing compliance requirements (e.g., routine inspections, follow-up corrective actions for failing BMPs, etc.), so without the Permit, the owners and contractors are not aware of the regulatory compliance requirements. Failure to obtain the Permit violates state rule. The failure to obtain the Permit and complete a SWPPP is considered a major deviation from compliance.[64]

37. The forum determined the base penalty for Violation Group #1 using the range for moderate potential for harm and major deviation from compliance ($2,000 to $5,000). The forum set the total base penalty at $3,500, stating:

> The base penalty for violation group #1 is placed in the range of $2,000 - $5,000 according to the penalty calculation table. There is no reason to deviate from the middle of that range

38. The forum determined that the Potential for Harm and the Deviation from Compliance for Violation Group #2 were both Major because:

> The intentional placement of fill material into 1.39 acres of a Type 7 wetland directly impacted the waters of the state. The fill material consisted primarily of clay sub-soil materials. After being placed directly into waters of the state, the fill material and other exposed soil immediate up-gradient of the wetland was never appropriately stabilized with any type of temporary or permanent vegetative cover. The failure to provide temporary or permanent cover on the fill material and surrounding exposed soil also resulted in impacts to waters of the state; as the fill had remained in this condition for one year. During that time the exposed soil has been exposed to rain events, snow, freeze/thaw cycles and thereby allowed to erode into the wetland. The deposition of sediment into the wetland through erosion and direct placement, resulted in excessive suspended solids within the wetland as well as aquatic habitat degradation. Had the regulated party adhered to the local Wetland Conservation Act permitting process prior to placing the fill in the wetland, it is possible that this activity may have been allowed to occur. Local WCA officials have indicated that the Regulated Party would have likely have received a 10,000 sq ft de minimis for the placement of fill.[65]

39. The forum determined the base penalty for Violation Group #2 using the range for major potential for harm and major deviation from compliance ($5,000 to $10,500). The forum set the total base penalty at $8,500, stating:

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[64] Ex. N.
[65] *Id*.

> The base penalty for violation group #2 is placed in the range of $5,000 - $10,000 according to the penalty calculation table. Due to the fact that the site is small in size, approximately 2.5 acres, there is a well vegetated ditch adjacent to the site and that the discharge from the site is not connected directly to Tischer Creek, the low end of this range has been selected.[66]

40. The forum addressed the enhancement or mitigation of the base penalty by considering the factors of willfulness/culpability, history of past violations, other factors as justice may require, and economic benefit. The forum determined that a 10% enhancement of $850.00 was appropriate because of a history of willful continuation of the violations. No enhancement or mitigation was given for history of past violations, economic benefit or "other factors as justice may require."[67]

41. Based on the component penalty calculations, the forum determined that the appropriate penalty was $9,350.00, and that the penalty would be non-forgivable because the violations were serious.[68]

42. On February 8, 2008, the MPCA issued an APO to the Petitioner.[69] The APO found a violation of Minn. R. 7090.2010, subp. 1, pertaining to NPDES/SDS construction storm water permit requirements; a violation of Minn. R. 7090.0210, subp. 3, pertaining to compliance requirements for unpermitted construction activities; and a violation of Minn. R. 7050.2010, subp. 2, pertaining to nuisance conditions in waters of the state. Pursuant to Minn. Stat. § 116.072, the MPCA required the Petitioner to pay a $9,350.00 non-forgivable penalty, to obtain a NPDES/SDS permit for the construction activity that occurred on the Properties, to submit a Stormwater Pollution Prevention Plan, and to submit a comprehensive plan of permit compliance to the MPCA.[70]

**Procedural Findings**

43. The Petitioner made a timely request for review of the APO by an administrative law judge pursuant to Minn. Stat. § 116.072, subd. 6(a).

44. On June 9, 2008, the Commissioner of the PCA issued a Notice and Order for Expedited Hearing Under Revenue Recapture Rules (Notice of Hearing) in this matter, and this contested case proceeding ensued.

45. Thereafter, the ALJ deferred scheduling of a hearing date, initially to provide the parties with an opportunity to explore the possibility of settlement and subsequently to provide the Petitioner with an opportunity to obtain the assistance of counsel.

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[66] *Id*.
[67] *Id*.
[68] *Id*.
[69] The MPCA issued a similar APO to Mattamy, which was not appealed. Testimony of Finke.
[70] Ex. K.

46. By Order issued on July 31, 2009, the ALJ scheduled an evidentiary hearing in this matter for Wednesday, September 9, 2009, and continuing as necessary on Thursday, September 10, 2009 and Friday, September 11, 2009, at the Office of Administrative Hearings, 600 North Robert Street, St. Paul, Minnesota.

47. On September 1, 2009, the MPCA filed a Motion in Limine seeking exclusion from the hearing any evidence and or testimony collaterally attacking the Restoration Order issued by the DNR and affirmed by the BWSR on February 7, 2007.[71]

48. On September 4, 2009, the Petitioner filed a Motion to Stay further proceedings pending a criminal proceeding involving the Petitioner currently pending before the Minnesota Court of Appeals in Docket Number A09-1027.

49. On September 8, 2009, the Petitioner also filed a Memorandum Opposing State Motion in Limine and a Motion to Exclude State Evidence.

50. On September 9, 2009, before the evidentiary hearing began, the ALJ heard oral argument on all of the pending motions.[72] After hearing and considering the arguments of counsel, the ALJ denied the MPCA's Motion in Limine, the Petitioner's Motion to Exclude State Evidence, and the Petitioner's Motion for a Stay.[73]

**Other Findings**

51. These Findings are based on all of the evidence in the record. Citations to portions of the record are not intended to be exclusive references.

52. To the extent that the Memorandum that follows explains the reasons for these Findings of Fact and contains additional findings of fact, including findings on credibility, the Administrative Law Judge incorporates them into these Findings.

53. The Administrative Law Judge adopts as Findings any Conclusions that are more appropriately described as Findings.

Based on the above Findings of Fact, the Administrative Law Judge makes the following:

## CONCLUSIONS

1. The Administrative Law Judge and the Commissioner of the MPCA have jurisdiction of this proceeding pursuant to Minn. Stat. §§ 14.57 – 14.62 and Minn. Stat. § 116.072.

2. The Notice of Hearing in this matter was proper, and all relevant substantive and procedural requirements of law or rule have been fulfilled. The matter is properly before the Administrative Law Judge.

[71] Exs. F and Q.
[72] Tr. pp. 4-38.
[73] Tr. p. 38.

3. The MPCA has the burden to establish by a preponderance of the evidence that the Petitioner violated applicable laws or rules, and that issuance of the Administrative Penalty Order was warranted. If the violations are established, the Administrative Law Judge may not recommend a penalty different in amount than that contained in the Administrative Penalty Order unless the amount of the proposed penalty is determined to be unreasonable, after considering the factors set forth in Minn. Stat. § 116.072, subd. 2(b).[74]

4. The MPCA proved by a preponderance of the evidence that construction activities, within the meaning of Minn. R. 7090.0800, subp. 4, occurred on both the 4th and 5th Avenue Properties in August 2006, and that those construction activities were part of a larger common plan of development within the meaning of Minn. R. 7090.0800, subp. 4.[75]

5. The MPCA proved by a preponderance of the evidence that the Petitioner violated Minn. R. 7090.2010, subp. 1, by failing to obtain an NPDES/SDS Construction Stormwater Permit before conducting construction activities on the Properties.[76]

6. The MPCA proved by a preponderance of the evidence that the Petitioner violated Minn. R. 7090.2010, subp. 3, by failing to comply with the storm water discharge design requirements, construction activity requirements, and the requirements of Appendix A while conducting construction activities on the Properties.[77]

7. The MPCA proved by a preponderance of the evidence that the Petitioner violated Minn. R. 7050.0210, subp. 2, by discharging storm water into a water of the state so as to cause a nuisance condition of excessive floating and suspended solids.[78]

8. The Notice and Order for Expedited Hearing Under Revenue Recapture Rules, issued by the MPCA on June 9, 2008, complied with the requirements of Minn. Stat. § 116.072 and Minn. R. 1400.8550.[79]

9. Proceeding with the evidentiary hearing in this contested case on September 9 and 14, 2009, did not violate the Petitioner's Fifth Amendment right against self-incrimination.[80]

10. Under Minn. Stat. § 116.072, subd. 3, an Administrative Penalty Order must include "a concise statement of the facts alleged to constitute a violation" and "a reference to the section of the statute, rule, ordinance, variance, order,

[74] Minn. Stat. § 116.072, subd. 6(c).
[75] *See also* discussion in Parts III-C and III-D of the Memorandum that follows.
[76] *See also* discussion in Part III-C of the Memorandum that follows.
[77] *See also* discussion in Part III-E of the Memorandum that follows.
[78] *See also* discussion in Part III-E of the Memorandum that follows.
[79] *See also* discussion in Part IV of the Memorandum that follows.
[80] *See also* discussion in Part V of the Memorandum that follows.

stipulation agreement, or term or condition of a permit or license that has been violated." The MPCA provided adequate notice of violations under this provision.

11. The Commissioner has the authority to assess penalties of up to $10,000 for violations of MPCA regulations. Pursuant to Minn. Stat. § 116.072, subd. 2(b), the Commissioner may consider the following factors in determining the amount of the penalty:

(1) the willfulness of the violation;

(2) the gravity of the violation, including damage to humans, animals, air, water, land, or other natural resources of the state;

(3) the history of past violations;

(4) the number of violations;

(5) the economic benefit gained by the person by allowing or committing the violation; and

(6) other factors as justice may require ….

12. Under Minn. Stat. § 116.072, subd. 5(b), for a serious violation, the Commissioner may issue an order with a penalty that will not be forgiven after the corrective action is taken. The MPCA has shown that the present violations were serious, and that a non-forgivable penalty is therefore appropriate.

13. Based upon a consideration of all of the statutory factors, and for the reasons discussed in the Memorandum that follows, the $9,350.00 penalty assessed by the MPCA against the Petitioner is reasonable and is supported by the record in this proceeding.

14. Any Finding of Fact more properly termed a Conclusion is adopted as such. Any Conclusion more properly termed a Finding of Fact is adopted as such.

15. These Conclusions are reached for the reasons discussed in the Memorandum that follows, which is hereby incorporated into these Conclusions.

Based upon the above Conclusions, the Administrative Law Judge makes the following:

## RECOMMENDATION

The Administrative Law Judge respectfully recommends that the Commissioner AFFIRM the violations set out in the Administrative Penalty Order issued on February 8, 2008, to Larry Cozzi and ASSESS against him the $9,350.00 civil penalty imposed by that Administrative Penalty Order.

Dated: January 19, 2010.

s/Bruce H. Johnson
BRUCE H. JOHNSON
Administrative Law Judge

Reported: Digitally recorded; transcript prepared.

## NOTICE

This Report is a recommendation, not a final decision. The Commissioner of the Minnesota Pollution Control Agency will make the final decision after a review of the record. The Commissioner may adopt, reject or modify the Findings of Fact, Conclusions, and Recommendations contained herein. Pursuant to Minn. Stat. § 14.61, the final decision of the Commissioner shall not be made until this Report has been made available to the parties to the proceeding for at least five days. An opportunity must be afforded to each party adversely affected by this Report to file exceptions and present argument to the Commissioner. Parties should contact Brad Moore, Commissioner, Minnesota Pollution Control Agency, 520 Lafayette Road, St. Paul, Minnesota 55155, 651-296-6300 to ascertain the procedure for filing exceptions or presenting argument.

If the Commissioner fails to issue a final decision within 90 days of the close of the record, this report will constitute the final agency decision under Minn. Stat. § 14.62, subd. 2a. The record closes upon the filing of exceptions to the report and the presentation of argument to the Commissioner, or upon the expiration of the deadline for doing so. The Commissioner must notify the parties and the Administrative Law Judge of the date on which the record closes.

## MEMORANDUM

### I. The Petitioner's Motion for a Stay Was Properly Denied.

On August 16, 2006, Mr. Boheim conducted a site inspection of the Properties. The purpose of that inspection was, in part, to assist the BWSR and the DNR in the enforcement of the Wetland Conservation Act, under the SSSWCD's partnership agreement with those two agencies.[81] While on the Properties, Mr. Boheim and a

[81] Finding 16 and 17.

representative of the Corps of Engineers found, among other things, that fill materials had been placed on 60,400 sq. ft. of the Properties that Mr. Boheim had found to be wetlands during a September 2005 inspection. Those findings were based on observations of the soil and vegetation, a soil check, and a determination of the extent of the filled area using GPS positioning.[82]

After completing his August 2006 inspection and acting on behalf of the DNR, Mr. Boheim prepared a Restoration Order that was served on the Petitioner on December 12, 2006.[83] The Restoration Order stated that it was being issued pursuant to Minn. Stat. § 103G.2372 and Minn. R. 8420.0290, and that violation of the Restoration Order was a misdemeanor. It then directed the Petitioner to do either of the following:

> A. Provide for the restoration of the wetland in the manner required by this order. Complete restoration must be accomplished on or before January 30, 2007; or
>
> B. Submit a complete wetland restoration plan, exemption, or no loss application to the South St. Louis SWCD, 215 North 1st Avenue East Room 301, Duluth, MN 55802 within 21 days of this order or prior to December 22, 2006, whichever comes first.[84]

Thereafter, the Petitioner was given an extension of the date for compliance with the Restoration Order until May 31, 2007.[85] As of June 7, 2007, the Petitioner had failed to comply with the Restoration, and on that date was charged with misdemeanor violation of the Restoration Order under Minn. Stat. § 103G.2372, subd. 2. Although he had failed to make a timely appeal of the Restoration Order to the BWSR,[86] the Petitioner asserted as a defense in the criminal proceeding that the Restoration Order had been legally defective because Mr. Boheim had failed to delineate wetlands on the Properties as required by law in Minn. R. 8420.0111, subp. 72D.[87] Nevertheless, upon trial by the District Court on January 13, 2009, the Petitioner was found guilty of that misdemeanor.[88] The Petitioner subsequently appealed his conviction to the Minnesota Court of Appeals as Docket No. A09-1027,[89] District Court subsequently stayed imposition of a judgment of conviction pending appeal.[90]

On September 4, 2009, the Petitioner filed a Motion to Stay further proceedings in this case pending the outcome of the criminal appeal. The ALJ heard further argument on that motion before the evidentiary hearing began on September 9, 2009.

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[82] Finding 18.
[83] Finding 20.
[84] Ex. F.
[85] Minnesota Pollution Control Agency Staff's Motion in Limine, Ex. B (District Court Transcript), p. 38.
[86] Finding 21.
[87] The Petitioner's citations have been to Minn. R. 8420.0110, subp. 52D. That rule was repealed and its contents re-adopted as Minn. R. 8420.0111, subp. 72D.
[88] District Court Transcript, p. 57.
[89] Finding 45.
[90] District Court Transcript, p. 80.

The Petitioner first argued that the District Court's stay of imposition of a judgment of conviction pending appeal had the legal effect of staying further proceedings in this contested case. The ALJ rejected that argument noting that the District Court's order of a stay did not expressly stay any other civil or administrative proceeding. Moreover, although the criminal case and this contested case involve some common issues of fact, this contested case is not directly associated with the criminal case. This contested case involves a separate violation of a completely different statute administered by a different state agency in which the elements of the violation differ materially.

The Petitioner next argued that the interests of justice require a stay. He contended that the legal requirements for wetland delineation in Minn. R. 8420.0111, subp. 72D, apply with equal force to these administrative proceedings under the SWPCA. Thus, the Petitioner asserts, prevailing on the issue of noncompliance with Minn. R. 8420.0111, subp. 72D, in the criminal appeal would represent a meritorious defense in this contested case. However, for the reasons set forth in Part II, below, the ALJ concludes that legal requirements for wetland delineation in Minn. R. 8420.0111 do not apply to enforcement proceedings under the SWPCA.[91] Therefore, even if the Court of Appeals holds that Mr. Boheim's findings about wetlands on the Properties failed to conform to the standards in the WCA, that would not establish that the Petitioner's construction activities did not impact wetlands in this contested case. The Petitioner's motion for a stay pending appeals was therefore properly denied.

## II. Provisions of the Wetland Conservation Act or Rules Adopted Thereunder Are Inapplicable to Enforcement Actions Under the State Water Pollution Control Act.

The Petitioner argues that the APO issued by the MPCA on February 8, 2008, should be reversed because it was affected by error of law, unsupported by substantial evidence, and arbitrary and capricious. The APO is factually based on the findings of SSSWCD's District Manager R. C. Boheim, who made site inspections of the Properties in September 2005, August 16, 2006, and August 7, 2007. Based on observations made and tests performed on the site, it was Mr. Boheim's professional opinion that the Petitioner had engaged in construction activities in August 2006 that affected a total of 2.5 acres of the Properties, resulted in fill materials being placed on 1.39 acres of wetlands on the Properties, and had failed to implement BMPs required by provisions of the MPCA's General Permit under the federal NPDES/SDS Program. The Petitioner argues that Mr. Boheim was legally obligated to conduct his site inspections in accordance with "the prescribed standards and protocols for determining the type and boundaries of wetlands regulated by the Wetlands Conservation Act,"[92] and that he failed to do so. The Petitioner therefore contends that there is an insufficient factual basis to support the MPCA's APO. However, for the reasons discussed below, the ALJ concludes that Mr. Boheim was not legally obligated to follow the wetland delineation

[91] *See* discussion in Part II, below.
[92] Petitioner's Hearing Statement, p. 2.

standards in the WCA in order to establish violations of MPCA rules adopted under the SWPCA.

### A. Definitions of "Wetlands" in Chapter 103G Are Not Equally Applicable to the Minnesota Water Pollution Control Act.

As the Petitioner observes, the State Water Pollution Control Act (SWPCA)[93] and the Wetland Conservation Act (WCA)[94] each define the term "waters of the state" somewhat differently. The SWPCA defines "waters of the state" as:

> all streams, lakes, ponds, marshes, watercourses, waterways, wells, springs, reservoirs, aquifers, irrigation systems, drainage systems and all other bodies or accumulations of water, surface or underground, natural or artificial, public or private, which are contained within, flow through, or border upon the state or any portion thereof.[95]

The WCA defines the same term as:

> surface or underground waters, except surface waters that are not confined but are spread and diffused over the land. Waters of the state includes boundary and inland waters.[96]

The term "wetlands" is not defined in Minn. Stat. §§ 115.01—115.09, except as a general component of "waters of the state." On the other hand, Minn. Stat. § 103G.005, subd. 19, defines "wetlands" more specifically as follows:

> (a) "Wetlands" means lands transitional between terrestrial and aquatic systems where the water table is usually at or near the surface or the land is covered by shallow water. For purposes of this definition, wetlands must have the following three attributes:
>
> (1) have a predominance of hydric soils;
>
> (2) are inundated or saturated by surface or ground water at a frequency and duration sufficient to support a prevalence of hydrophytic vegetation typically adapted for life in saturated soil conditions; and
>
> (3) under normal circumstances support a prevalence of such vegetation.

Minn. Stat. § 103G.005, subd. 17b, also describes wetlands in terms of their typology "according to Wetlands of the United States, U.S. Fish and Wildlife Service Circular 39 (1971 edition)." That subdivision goes on to identify eight types of wetland

[93] Minn. Stat. § 115.09 provides that Minn. Stat. §§ 115.01 through 115.09 comprise the State Water Pollution Control Act (SWPCA).
[94] Minn. Stat. ch. 103G.
[95] Minn. Stat. § 115.01. subd. 22.
[96] Minn. Stat. § 103G.005, subd. 17.

by providing summary descriptions of their soils, typical vegetation, and hydrologic characteristics.

The Petitioner begins his legal analysis by asserting that there is no meaningful difference between the WCA's and SWPCA's respective definitions of wetlands, and that the two definitions should be interpreted *in pari materia*. Whether or not the two definitions should be interpreted as being *in pari materia* is not in itself material to the issues in this case. However, the Petitioner then proceeds to argue that reading the two definitions wetlands *in pari materia* necessarily requires that Chapter 115 and Chapter 103G must also be read *in pari materia*; that Chapter 115 must be considered part of the Water Law of the state; that other provisions and definitions in Chapter 103G apply with equal force to Chapter 115; and that rules promulgated under the authority of Chapter 103G also apply with equal force to proceedings under Chapter 115. Having asserted those legal propositions the Petitioner then argues that because Mr. Boheim's delineation of wetland on the Properties failed to meet WCA standard, there is a failure of proof.

The fallacy underlying the Petitioner's argument is that the Legislature did not intend Chapters 115 and 103G to be read *in pari materia*. Minn. Stat. § 103G.001 provides:

> Chapters 103A, 103B, 103C, 103D, 103E, 103F, and 103G constitute the water law of this state and may be cited as the Water Law.

Chapters 103A, 103B, 103C, and 103F all contain identical provisions. None of them mention Chapter 115 or any other chapter of Minnesota Statutes as constituting the water law of the state.[97] In other words, the Legislature was very explicit about which chapters of Minnesota Statutes it intended to be read *in pari materia* as part of the water law of the state, and Chapter 115 was not one of them.

Moreover, Minn. Stat. § 103G.005, which contains definitions for Chapter 103G, provides that "[t]he definitions in this section apply to this chapter." In other words, the Legislature did not even provide that definitions in one chapter of the Water Law would apply to other chapters in the Water Law, much less to a completely unrelated chapter, such as Chapter 115. For example, Minn. Stat. § 103G.005, subd. 7, provides that "'[c]ommissioner' means the commissioner of natural resources," and Minn. Stat. § 103F.111, subd. 2, contains exactly the same definition of "commissioner." If the Legislature had intended statutory definitions in one chapter of the Water Law to apply with equal force even to other chapters of the Water Law, it would have been unnecessary to incorporate identical definitions of "commissioner" in more than one chapter of the Water Law prescribing duties for the Commissioner of Natural Resource.[98]

[97] See Minn. Stat. §§ 103A.001, 103B.001, 103C.001, and

[98] No chapter of the Water Law defines "commissioner" as the commissioner of any other state agency.

Finally, the broad purpose of Chapter 103G is the "conservation, allocation, and development of waters of the state for the best interests of the people,"[99] and its provisions are administered and enforced by BSWR and the Commissioner of Natural Resources.[100] The more specific and narrow purpose of Chapter 115 is the administration and enforcement of "all laws relating to the pollution of any of the waters of the state," and that responsibility is vested in the MPCA.[101] Although the two chapters share some underlying policies and public interests, those policies and public interest are not the same and may even conflict in some situations.

In summary, the Petitioner's argument that the Legislature intended statutory definitions in Chapter 103G to "also apply within the context of the State Water Pollution Control Act" is not supported by legislative intent determined under traditional rules of statutory construction.[102]

### B. Rules in Minn. R. 8420 on Determining Boundaries of Wetlands Do Not Govern Enforcement Investigations Related Under the Minnesota Pollution Control Act.

The Petitioner also argues that Mr. Boheim was required by law to establish the boundaries of wetlands on the Properties on August 16, 2006, in accordance with the procedures set forth in Minn. R. 8420.0111, subp. 72D, which provides:

> The wetland size is the area within its boundary. The boundary must be determined according to the United States Army Corps of Engineers Wetland Delineation Manual (January 1987). The wetland type must be determined according to Wetlands of the United States, (1971 edition). Both documents are incorporated by reference under part 8420.0112, items A and B. The local government unit may seek the advice of the technical evaluation panel as to the wetland size and type.

However, since statutory provisions of Chapter 103G are not *in pari materia* with the State Pollution Control Act, Minn. Stat. §§ 115.01 – .09, it follows that rules adopted by the DNR governing inspections for enforcement purposes under Chapter 103G do not govern inspections for enforcement purposes under Minn. Stat. §§ 115.071, subd. 6 and 116.072.

Moreover, the authority for the adoption of Minn. R. 8420.0111, subp. 72D, is found in Minn. Stat. § 103G.2242, subd. 1(a), which provides in pertinent part:

> (a) The board, in consultation with the commissioner, shall adopt rules governing the approval of wetland value replacement plans under this section and public waters work permits affecting public waters wetlands

[99] Minn. Stat. § 103G.101.
[100] Minn. Stat. § 103G.005, subds. 6a and 7.
[101] Minn. Stat. § 115.03, subd. 1(a).
[102] Minn. Stat. § 103F.111, subd. 2, also provides that "'[c]ommissioner' means the commissioner of natural resources."

> under section 103G.245. These rules must address the criteria, procedure, timing, and location of acceptable replacement of wetland values . . . .

Minn. Stat. § 103G.245 requires obtaining a permit from BWSR for work in public waters. That requirement is separate and independent of the requirement in Minn. R. 7090.2010 requiring an NPDES/SDS Construction Stormwater Permit before engaging construction activities that disturb more than one acre of land and result in storm water being discharged into waters of the state. Minn. Stat. § 103G.2242, subd. 1(a), is explicit about its limited application. Its process for delineation of wetlands only applies to permits under Minn. Stat. § 103G.245. That process is not mandatory for other purposes in the Water Law, much less for enforcement actions under the State Pollution Control Act. Moreover, even if Minn. Stat. § 103G.2242, subd. 1(a) were not explicit about its application, nothing in that statute authorizes BSWR or DNR to adopt rules applicable to the MPCA. Minn. Stat. § 14.05, subd. 1, provides in pertinent part:

> Each agency shall adopt, amend, suspend, or repeal its rules in accordance with the procedures specified in sections 14.001 to 14.69, and *only pursuant to authority delegated by law* and in full compliance with its duties and obligations. [Emphasis supplied.]

In fact, an attempt by the MPCA to enforce a requirement not found in its own rules would represent an unadopted rule prohibited by Minn. Stat. § 14.381.

## III. A Preponderance of the Evidence Established that the Petitioner's Construction Activities Impacted Wetlands and Violated the SWPCA.

### A. The MPCA alleged that the Petitioner committed three violations of rules adopted under the SWPCA.

Minn. Stat. § 116.072, subd. 1(a), provides in relevant part:

> The commissioner may issue an order requiring violations to be corrected and administratively assessing monetary penalties for violations of this chapter and chapters 114C, 115, 115A, 115D, and 115E, *any rules adopted under those chapters* , and any standards, limitations, or conditions established in an agency permit; [Emphasis supplied.]

Additionally, Minn. Stat. § 115.03, subd. 5c(b) authorizes "the agency to adopt and enforce rules regulating point source storm water discharges," including Minn. R. 7090 and Minn. R. 7050.0210, which prohibits discharges of wastes into waters of the state from either point or nonpoint sources. The MPCA alleges that the Petitioner committed three separate violations of those rules:

a. Beginning construction activities that disturbed more than one acre of land without first obtaining an NPDES/SDS Construction Stormwater Permit in violation of Minn. R. 7090.2010, subp. 1;

b. Violating the provisions of Minn. R. 7090.2010, subp. 3, by failing to comply with the storm water discharge design requirements, construction activity requirements, and the requirements set forth in Appendix A to the MPCA's General Permit under the federal NPDES/SDS Program;[103] and

c. Creating nuisance conditions in violation of Minn. R. 7050.0210.

**B. The MPCA must establish by a preponderance of the evidence that violations of applicable rules occurred.**

The MPCA initiated this contested case proceeding under the Revenue Recapture Rules, Minn. R. 1400.8505 to 1400.8612.[104] Minn. R. 1400.8608 provides:

> The party with the burden of proof shall have the burden of supporting its proposed action by a preponderance of the evidence. If another party asserts any affirmative defenses, that party shall have the burden of proving the defense by a preponderance of the evidence.

In the absence of specific statutory and rule provisions governing the definition of wetlands and the procedure for determining wetland boundaries in enforcement actions under Minn. Stat. § 116.072, the MPCA's burden is to establish those facts in this proceeding by a preponderance of the evidence.

**C. A preponderance of the evidence established that the Petitioner conducted construction activities that disturbed his property without first obtaining an NPDES/SDS Construction Stormwater Permit.**

Minn. R. 7090.2010, subp. 1, requires property owners and operators to obtain an NPDES/SDS Construction Stormwater Permit before conducting "construction activities." Minn. R. 7090.0800, subp. 4, defines "construction activity," in relevant part as:

> [A]ctivities for the purpose of construction, including clearing, grading, and excavating, that result in land disturbance of equal to or greater than one acre, including the disturbance of less than one acre of total land area that is part of a larger common plan of development or sale if the larger common plan will ultimately disturb equal to or greater than one acre. This includes a disturbance to the land that results in a change in the topography, existing soil cover, both vegetative and nonvegetative, or the existing soil topography that may result in accelerated storm water runoff which may lead to soil erosion and movement of sediment.

As District Manager of the SSSWCD, Mr. Boheim had a dual responsibility to assist the DNR in the enforcement of the WCA and to assist the MPCA in the

[103] Minn. R. 7090.0060 incorporates those documents by reference into Minn. R. 7090.
[104] Notice of Hearing; *see also* Minn. Stat. § 116.072, subd. 6.

enforcement of the SWPCA. A preponderance of the evidence established that in September 2005, Mr. Boheim, acting as an adjunct inspector for BWSR and the DNR, conducted a site inspection of both the 4th and 5th Avenue Properties along with a representative of the Corps of Engineers. They marked the boundaries of areas on the property that they determined were wetland areas by placing stakes with pink flags around those areas. They marked portions of Lot 516 of the 4th Avenue Property that would be affected by fill in the Petitioner's Corps of Engineers and DNR permit applications, as well as the wetland areas of Lots 526 and 527 that were not then the subject of the pending permit application.

It is immaterial that in September 2005, Mr. Boheim was then acting solely as an adjunct inspector for BWSR and DNR and not as an adjunct inspector for the MPCA. It is also immaterial whether or not Mr. Boheim's delineation of wetlands on the Properties conformed to the requirements of Minn. Stat. § 103G.2242, subd. 1(a). What is material to this proceeding is that Mr. Boheim's documentation and testimony describing his September 2005 inspection is credible and highly probative evidence of: (1) the fact that there were wetlands on the Properties at that time that represented "waters of the state," within the meaning of Minn. Stat. § 115.01. subd. 22; and (2) that Mr. Boheim had personal knowledge in September 2005 of where on the Properties those wetlands were located.

The evidence also established that when Mr. Boheim visited the site a year later on August 16, 2006, some of the wetlands that he had seen on the Properties in September 2005 had been covered by fill materials and disturbed by construction activities. Moreover, evidence of that was not confined to Mr. Boheim's visual observations. He and the Corps of Engineers' representative conducted a soil check in an area that appeared to have been recently filled that established that fill has been placed on hydric soil that is characteristic of a wetland. Mr. Boheim also observed the presence of hydric vegetation adjacent to recently filled areas. He observed wetland hydrology in and around the fill areas. Based on these and other observations made on the site, Mr. Boheim found that recent construction activity had disturbed significant areas of the Properties that had been Type 6/7 wetlands in September 2005.[105] Although it may have been necessary for Mr. Boheim to identify by type the wetlands that he found to be filled on the properties in his capacity as an adjunct inspector for DNR, it was unnecessary for him to do so in his capacity as an adjunct inspector for MPCA. In other words, he did more in his inspection report for the MPCA in terms of describing impacted wetlands than was legally necessary under the SWPCA.[106] Mr. Boheim also testified that the land disturbing activities that he observed on the

[105] Finding 17.

[106] The MPCA also introduced Exhibits O and P, which are aerial photographs of the 4th and 5th Avenue Properties taken on August 6, 2006, and in 2003, respectively. However, in the ALJ's view, those photographs were less probative than Mr. Boheim's testimony and documentation. Although areas of forested and unforested can be distinguished in both photographs, it is impossible to distinguish wetlands from upland ground cover. Additionally, even if wetland areas were distinguishable from upland ground cover, it is impossible to determine with any degree of accuracy the dimensions and acreage of wetland areas. This is in contrast to the GPS coordinates that Mr. Boheim actually took on the site on August 16, 2006.

Properties resulted in sediment, solid material, dirt and construction debris being placed in adjacent wetlands and into a drainage ditch that discharged into Tischer Creek, a designated trout stream.[107]

By contrast, the Petitioner introduced both documentary evidence that fill materials had been placed on the Properties from time to time from the 1960s or 1970s up to September 2005. However, whether that was the case is immaterial to the outcome of this proceeding because this case involves land-disturbing activities in August 2006 on portions of the Properties that the evidence established were wetlands in September 2005. None of that evidence presented by the Petitioner contradicted the evidence that there were still wetlands on both the 4th and 5th Avenue Properties in September 2005. It was also uncontroverted that the Petitioner had not obtained permits from any governmental authority to place additional fill materials on the Properties between September 2005 and August 16, 2006. Finally and perhaps most important, the Petitioner introduced no evidence that the fill placement and construction activities that occurred in August 2006 only affected portions of the Properties that were not wetlands in September 2005.

In summary, the ALJ concluded that a preponderance of the evidence established that the Petitioner conducted, or allowed to be conducted, construction activities in the summer of 2006 that impacted what had been wetland areas on the Properties in September 2005.

### D. Petitioner's construction activities disturbed 2.5 acres of total land that is part of a larger common plan of development.

The Petitioner claims that over the years, he has been incrementally developing a number of small separate and unrelated projects on Lots 516 of the 4th Avenue Property and Lots 526, 527, and 528 of the 5th Avenue Property, and that the MPCA therefore failed to establish that the construction activities that occurred in August 2006 were part of a larger plan of development. As noted above, an NPDES/SDS permit is required for land disturbance of less than one acre of total land area that is part of a larger common plan of development. First of all, the 4th and 5th Avenue Properties are contiguous and comprise the Petitioner's homestead.

Although the Petitioner may have obtained permits over the years from various permitting authorities for a number of incremental projects on both the 4th and 5th Avenue properties, the most recent being permits from both the Corps of Engineers and the Town in September 2005 to place fill on 10,000 square feet of upland areas of Lot 516 of the 4th Avenue Property.[108] However, the only issue here is the existence of fill materials placed on both the 4th and 5th Avenue Properties between September 2005 and August 16, 2006, that covered wetlands and exceeded what was allowed in the September 2005 permits.

[107] Findings 23 and 24.
[108] Findings 13 and 14.

On August 16, 2006, the Petitioner was found to have disturbed 2.5 acres of land on both the 4th and 5th Avenue Properties, including disturbance of 60,400 square feet of wetlands located on both the 4th and 5th Avenue Properties. Even if one were to assume that that land disturbance included the 10,000 sq. feet of upland described in the 2005 permits, that still leaves over two acres of contiguous land on both the 4th and 5th Avenue Properties that were contemporaneously disturbed without permits from any permitting authority. In other words, in August 2006, unpermitted, construction activities disturbed over two contiguous acres of wetlands and adjacent uplands on both the 4th and 5th Avenue Properties. Minn. R. 7090.0080, subp. 3, defines "common plan of development or sale" as:

> [O]ne proposed plan for a contiguous area where multiple separate and distinct land disturbing activities may be taking place at different times, on different schedules, but under one proposed plan. 'One proposed plan' is broadly defined to include design, permit application, advertisement, or physical demarcation indicating that land-disturbing activities may occur.

Here, the August 2006 land disturbing activities on the contiguous 4th and 5th Avenue Properties were done contemporaneously and not even "at different times, on different schedules." Those construction activities alone involved a common plan of contemporaneous development for both the 4th and 5th Avenue Properties.

Finally, the Petitioner appears to argue that August 2006 construction activities on the 4th Avenue Property were solely for the business purpose of constructing a pole barn and garage to house trucks used in the Petitioner's business, while contemporaneous construction activities on the 5th Avenue Property were solely for domestic purposes. But the evidence did not even establish that. The Petitioner's brother testified that "the project on Fifth Avenue was to bring more dirt to rebuild that site,"[109] without any reference to the purpose for which the site was being "rebuilt." Moreover, there was no evidence establishing whether or not the Petitioner also conducted business-related activities from his home on the Fifth Avenue Property.

In summary, the ALJ concludes that the land-disturbing construction activities that were contemporaneously conducted on the 4th and 5th Avenue Properties in August 2006 were part of a common plan of development.

### E. A preponderance of the evidence that the Petitioner failed to comply with NPDES/SDS Construction Activity Requirements.

Minn. R. 7090.2010, subp. 3, provides:

> Owners and operators of construction activities required to have a construction storm water permit under this part that fail to submit a permit application or subdivision registration under subpart 2 shall comply with the storm water discharge design requirements, construction activity

[109] Tr. p. 304.

> requirements, and the requirements of Appendix A in the construction storm water permit as incorporated by reference in part 7090.0060.

Minn. R. 7090.0060 provides:

> For the purposes of parts 7090.2000 to 7090.2060, the storm water discharge design requirements, construction activity requirements, and the requirements of Appendix A in the Minnesota Pollution Control Agency document General Permit Authorization to Discharge Storm Water Associated With Construction Activity Under the National Pollutant Discharge Elimination System/State Disposal System Permit (NPDES/SDS) Program (construction storm water permit) are incorporated by reference. [Hereafter Appendix A]

Appendix A requires owners and operators of construction activities to implement Best Management Practices to prevent construction waste and sediment from entering waters of the state, which include wetlands.[110]

> 'Best management practices' or "BMP's" means practices to prevent or reduce the pollution of the waters of the state, including schedules of activities, prohibitions of practices, and other management practice, and also includes treatment requirements, operating procedures, and practices to control plant site runoff, spillage or leaks, sludge, or waste disposal or drainage from raw material storage.[111]

The only evidence of BMPs that Mr. Boheim observed during his August 16, 2006, site inspection was a black silt fence in a grassy area of the Properties. One of the Petitioner's neighbors stated that he had constructed the silt fence.[112] On the other hand, Mr. Cozzi's son testified that he and Mr. Cozzi's grandson "put up all the silt fence around the perimeter of the dirt."[113] However, that testimony was not credible because other evidence clearly established that there was only a single linear section of silt fence near one side of the construction activity and not silt fencing encircling the construction activity. In any event, the evidence established the absence in both August 2006 and August 2007 that any other measures had been taken to prevent erosion, keep soil on the site, and prevent dislodged soil from being deposited in waters of the state through sedimentation.[114]

When Mr. Boheim returned to the site a year later on August 7, 2007, he observed that no slope stabilization had been performed on portions of the Properties that had been graded and filled during the previous year, nor had temporary or permanent ground cover been placed on erodible soils. There also still were no perimeter controls to prevent sediment from erodible fill materials from being discharged

[110] *See* Part II-A, above.
[111] Minn. R. 7090.0080, subp. 2.
[112] Tr. p. 83.
[113] Tr. p. 377.
[114] Finding 19.

into adjacent wetlands. As a result, sediment from erodible soils on the Properties had been discharged into adjacent wetlands, and no efforts had been made to remove sediment from those wetlands.[115]

In short, the ALJ concludes that the Petitioner violated the provisions of Minn. R. 7090.2010, subp. 3, by failing to implement BMPs to prevent sediment and construction debris from being introduced into wetlands and other waters of the state.

### F. Public Nuisance

Minn. R. 7050.0210, subp. 2, provides:

> No sewage, industrial waste, or other wastes shall be discharged from either point or nonpoint sources into any waters of the state so as to cause any nuisance conditions, such as the presence of significant amounts of floating solids, scum, visible oil film, excessive suspended solids, material discoloration, obnoxious odors, gas ebullition, deleterious sludge deposits, undesirable slimes or fungus growths, aquatic habitat degradation, excessive growths of aquatic plants, or other offensive or harmful effects.

The Petitioner argues that the MPCA failed to establish the existence of a nuisance condition created by the construction activities on the Properties by failing to allege and prove a direct, adverse impact on human health. However, the Legislature has specifically concluded that discharges of pollutants, including sediment and suspended solids into waters of the state, which include wetlands, are nuisances by prohibiting:

> the discharge of any pollutant into any waters of the state or the contamination of any waters of the state *so as to create a nuisance* or render such waters unclean, or noxious, or impure so as to be actually or potentially harmful or detrimental or injurious to public health, safety or welfare, to domestic, agricultural, commercial, industrial, recreational or other legitimate uses, or to livestock, animals, birds, fish or other aquatic life;[116] [Emphasis supplied.]

As noted above, the Legislature has also authorized the MPCA to adopt and enforce rules regulating point source storm water discharges.[117] Minn. R. 7050.0210, subp. 2, substantially mirrors the Legislature's statutory definition of nuisance and specifically prohibits the discharge of significant amounts of floating and suspended solids and other discharges that produce "other offensive or harmful effects." A preponderance of the evidence established that the construction activities on the Properties resulted in the deposition of solids on wetlands on the Property and into ditches that drained into an adjacent trout stream. The evidence therefore established that the Petitioner violated Minn. R. 7050.0210, subp. 2.

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[115] Tr. pp. 103-104; Ex. J.
[116] Minn. Stat. § 115.01, subd. 13.
[117] Minn. Stat. § 115.03, subd. 5c(b).

## IV. The Notice of Hearing Conformed to the Requirements of Minn. Stat. § 116.072 and Minn. R. 1400.8550.

Without being specific, the Petitioner argues that the MPCA failed to give notice "to whom the order is directed of the time and place of the hearing at least 20 days before the hearing," as required by Minn. Stat. § 116.072, and that the Notice of Hearing failed to meet the requirements of Minn. R. 1400.8550. The Notice of Hearing ordered that the hearing "will be held on a date to be determined by the Administrative Law Judge at the Minnesota Pollution Control Agency, 525 Lake Avenue South, Suite 400 Duluth, MN 55802." Since both counsel and agency witnesses were located in the Twin Cities Metro Area, counsel agreed to have the evidentiary hearing at OAH's St. Paul office, and by Order issued on July 31, 2009, the ALJ scheduled the hearing on September 9, 2009. With regard to the information in the notice, the Notice of Hearing attached and incorporated by reference a copy of the APO issued on February 8, 2008. The Notice of Hearing itself, together with the attached APO, included all of the information required by Minn. R. 1400.8550. The ALJ therefore concludes that the Notice of Hearing conformed to the requirements of Minn. Stat. § 116.072 and Minn. R. 1400.8550.

## V. The Petitioner Was Not Deprived of His Constitutional Rights

The Petitioner also argues that the MPCA improperly denied the Petitioner of his Fifth Amendment right against self-incrimination by proceeding with an evidentiary hearing in this contested case. He reasons that there is pending appeal in a criminal case, which he claims directly challenges "the restoration order upon which the administrative penalty is premised."[118] However, as discussed in Part I, above, this contested case involves a separate violation of a completely different statute administered by a different state agency in which the elements of the violation differ materially. Moreover, Minn. Stat. § 103G.2372, subd. 2, make violation of a BWSR restoration order a misdemeanor criminal offense, but there are no criminal consequences for violating MPCA rules adopted under Minn. Stat. § 115.03. Testifying in this proceeding would therefore not subject the Petitioner to any additional criminal liability. Additionally, the defenses asserted by the Petitioner in this proceeding involved issues of statutory interpretation, procedural or constitutional irregularities, or assertions that the MPCA failed to meet its burden of proof. The Petitioner asserted those defenses primarily by cross-examining the MPCA's witness or by arguing about the legal effect of uncontroverted facts. He presented the testimony of the Petitioner's brother and son and a Town inspector. There has been no assertion that a 5th Amendment impediment to presenting his own testimony prevented him from raising some other legally viable defense to the APO. The ALJ therefore concludes that the Petitioner was not unreasonably prejudiced by a 5th Amendment impediment to presenting his own testimony.

[118] Petitioner's initial post-hearing memorandum, p. 38.

## VI. The Amount of the Administrative Penalty Assessed Against the Petitioner Was Appropriate Under the Circumstances.

Finally, the Petitioner argues that there is no basis in law or fact for the MPCA's finding that the Petitioner's violations of applicable rules were "serious," and that the administrative penalty assessed was excessive and should not have been non-forgivable.

Minn. Stat. § 116.072, subd. 6(c), provides:

> The administrative law judge shall issue a report making recommendations about the commissioner's or county board's action to the commissioner or county board within 30 days following the close of the record. The administrative law judge may not recommend a change in the amount of the proposed penalty unless the administrative law judge determines that, based on the factors in subdivision 2, the amount of the penalty is unreasonable.

Minn. Stat. § 116.072, subd. 2(b) provides:

> (b) In determining the amount of a penalty the commissioner or county board may consider:
>
> (1) the willfulness of the violation;
>
> (2) the gravity of the violation, including damage to humans, animals, air, water, land, or other natural resources of the state;
>
> (3) the history of past violations;
>
> (4) the number of violations;
>
> (5) the economic benefit gained by the person by allowing or committing the violation; and

Minn. Stat. § 116.072, subd. 6(c), is a legislative recognition of the principle long recognized by appellate courts that requires a reviewing tribunal to be strongly deferential to decisions on sanctions made by administrative agencies. In *Matter of Haugen*,[119] the Minnesota Supreme Court stated:

> that the assessment of penalties and sanctions by an administrative agency is not a factual finding but the exercise of a discretionary grant of power. [Citations omitted.] But of course the agency's discretion in imposing sanctions is not unfettered. [Citations omitted.] And if that discretion is abused, we will set the sanction aside on appeal. [Citations omitted.]

[119] *Matter of Haugen*, 278 N.W.2d 75, 80 at fn. 10 (Minn. App. 1979).

The Petitioner first asserts that waiting two years after becoming aware of the disputed fill before issuing the AVL "belies any characterization of the violation as 'serious.'"[120] The MPCA became aware of the violations on August 16, 2006. DNR's Restoration Order, which was served on the Petitioner on December 12, 2006, directed the Petitioner to apply for an NPDES/SDS Permit prior to December 15, 2006.[121] However, the Petitioner appealed that decision to the BWSR, which delayed implementation of the Permit directive until February 7, 2007, when the BWSR issued an order affirming the Restoration Order.[122] The BWSR then gave the Petitioner an extension for compliance until May 31, 2007.[123] About two months later, on August 7, 2007, Mr. Boheim conducted a follow-up site inspection of the Properties and determined that the Petitioner had neither complied with the BWSR's order of affirmance nor the requirement to obtain an NPDES/SDS Permit, nor had the Petitioner implemented any BMPs during the intervening twelve months. Mr. Boheim notified the MPCA of the Petitioner's noncompliance with NPDES/SDS Permit rules the following day.[124] The MPCA immediately convened an enforcement forum and issued the AVL to the Petitioner on August 27, 2007.[125] In short, the only delay in enforcement was the six months between the time the directive to obtain an NPDES/SDS permit became effective and the date Mr. Boheim conducted his follow-up inspection.

The Petitioner also argued that the MPCA's finding that the violations were serious were unreasonable because there was no evidence of a repeat offense and because the violations were premised "on false accusation of discharge to a special water and unfounded allegation of unpermitted fill within a wetland."[126] However, as discussed above, those premises are not false. A preponderance of the evidence established that on or about August 16, 2006, 1.39 acres of wetlands on the Properties were filled with soil and were thereby converted into uplands. The evidence also established that sediment and construction debris from the land disturbing activities on the Properties were placed and washed by storm water into a drainage ditch connected to a designated trout stream. It was therefore neither unreasonable nor an abuse of discretion for the MPCA to find that the violations were serious and warranted a $9,350.00 non-forgivable penalty.

[120] Petitioner's Brief, p. 33.
[121] Ex. F.
[122] Ex. Q.
[123] Minnesota Pollution Control Agency Staff's Motion in Limine, Ex. B (District Court Transcript), p. 38.
[124] Finding 27.
[125] Findings 28 and 29.
[126] Petitioner's Brief, p. 33.

## VII. Conclusion

For the reasons set forth above, the ALJ concludes that the Petitioner violated Minn. R. 7090.2010, subps. 1 and 3, and 7050.0210, subp. 2; that the MPCA properly issued the APO dated February 8, 2008, to him; and the civil penalty of $9,350.00 was reasonable and supported by the record. That APO and civil penalty should therefore be affirmed.

**B.H.J.**